IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

FIRST APPEAL NO. 258 OF 2005

TAHERA ABBAS DALVI .. APPELLANT

vs

MUNICIPAL CORPN. FOR GR.BOMBAY & ANR.. RESPONDENTS

Mr. A. S. & R. S. Khatib for appellant

Mr. Xavier for respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-9-2-2005

Admit. Respondents waive service. By consent of the parties, the matter is taken up for final hearing forthwith.

2. The appellant is original plaintiff. The plaintiff filed L.C.Suit No. 5804 of 1996 in the City Civil Court at Mumbai, challenging the notice issued by the respondent Corporation under Section 351 of the Bombay Municipal

Corporation Act. The plaintiff prayed for an injunction restraining the defendants, their servants, agents and representatives from implementing, executing and/or taking any action pursuant to the said notice.

3. The defendant Corporation did not file written statement. The defendant Corporation did not examine any witness. The learned Judge, however, on examination of the evidence of the plaintiff and after examining the documents produced by her came to a conclusion that the impugned notice was perfectly legal and he, therefore, dismissed the suit.

4. The learned counsel for the appellant submitted that defendant Corporation has not chosen to contest the suit. The defendant Corporation has not filed written statement. No officer of the defendant has stepped into the witness box. He submitted that the trial court has observed that the plaintiff was required to file a sanctioned plan of the building in which the suit structure is shown so as to establish the case that it was in existence prior to 1962. The learned counsel contended that it was wrong on the part of the trial court to make this observation because sanctioned plan could have been produced by the Corporation. If the Corporation would have examined the witness, plaintiff could have called upon the witness to produce the said document. In fact it was the responsibility of the Corporation to produce the

document. He, therefore, submitted that the impugned judgment and order deserves to be set aside.

5. Mr. Xavier, the learned advocate for the Corporation submitted that inasmuch as the Respondent Corporation has not filed a written statement and not examined any witness, a chance may be given to the Corporation to contest the suit so that all relevant facts could be brought on record. He submitted that, therefore, the matter may be remanded and opportunity may be given to the Corporation to file written statement.

6. In the circumstances of the case, therefore, in my opinion, following order should meet the ends of justice.

> "Impugned judgment and order is set aside.
>
> L.C. Suit No. 5804 of 1996 is remanded back to the City Civil Court at Bombay. The trial court is directed to permit the respondent Corporation to file its written statement.
>
> Mr. Xavier, learned advocate for the Corporation states that written statement will be filed within a period of six weeks from today.

Upon the Corporation filing its written statement the learned Judge shall decide the matter afresh after giving opportunity to the plaintiff as well as to the defendants to lead such evidence as they find necessary.

Needless to say that during the pendency of the suit the Corporation shall not execute the impugned notice and impugned order.

The appeal is disposed of in the aforestated terms.

Parties to act on authenticated copy of this order.